De Paul Adult Care Communities, Inc. *and* Ronald E. Nerau, Petitioner and District 1199, Rochester Hospital & Healthcare Employees Union, SEIU, AFL–CIO. Case 3–RD–1261

April 28, 1998

ORDER DENYING REVIEW

BY CHAIRMAN GOULD AND MEMBERS FOX AND LIEBMAN

The National Labor Relations Board has delegated its authority in this proceeding to a three-member panel, which has considered the Union's Request for Review of the Regional Director's Decision and Direction of Election (pertinent portions of which are attached as an appendix).[1] The request for review is denied as it raises no substantial issues warranting review.

[1] The only issue on which review was requested was the Regional Director's finding that there was no contract bar to the processing of the instant petition.

APPENDIX

REGIONAL DIRECTOR'S DECISION AND DIRECTION OF ELECTION

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4/ The sole issue raised during the hearing is whether a collective bargaining agreement between the Employer and the Union would bar the processing of the petition. The Union takes the position that a collective-bargaining agreement did exist, as the Union had accepted the Employer's contractual offer in its entirety and communicated its acceptance to the Employer before the petition was filed. The Employer asserts that a collective-bargaining agreement did not exist, because the Employer never indicated in writing its offer or acceptance of a collective-bargaining agreement.

The Union has represented the bargaining unit herein for approximately 2 years. It was certified by the Board as the unit's collective-bargaining representative in November 1995. Thereafter, the Union and the Employer entered into a collective-bargaining agreement which was effective from September 27, 1996 to December 31, 1997. Ninety days prior to the expiration of the collective-bargaining agreement, the Union notified the Employer of its desire to reopen negotiations for a new agreement. The parties had contractual discussions via telephone during the fall and winter of 1997. There were no written offers made during these discussions; however, the Union memorialized what it believed to be the Employer's final contract offer in a letter dated January 6, 1998. The letter, composed by the Union's president, Bruce Popper, was faxed to the Employer's Vice President of Human Resources, Sue Potter-Tuma, on the same date. In the letter, Popper indicated that the Union intended to present the Employer's offer to its members and to seek their approval on January 7, 1998. The letter further stated that, in the event of the members' approval, the Union would be requesting a brief negotiating meeting to formalize its acceptance of the Employer's offer.

The Union's members ratified the Employer's offer on January 7, 1998. The Union asserts that, immediately prior to the ratification meeting, Potter-Tuma left a telephone message for Popper stating that the information contained in the January 6, 1998 letter accurately reflected the parties' agreement. At the hearing, Potter-Tuma did not recall leaving such a message; however, she admitted that the January 6, 1998 letter accurately reflected the Employer's contractual offer. On January 14 or 15, 1998, Popper informed Potter-Tuma, via telephone, that the Union's members had ratified the agreement, that it was final and that the Union was ''all set.'' Both parties agree that as of January 14 or 15, 1998, all of the issues had been resolved and there were none left to be negotiated.

By letter dated January 21, 1998, Potter-Tuma proposed to Popper that the parties meet on February 4, 1998, in light of the cancellation of the negotiating session scheduled for January 29, 1998. On January 22, 1998, Popper faxed to the Employer's attorney draft language for the contract articles which were to be changed to reflect the Employer's offer. The Employer admits that the language contained therein was also an accurate reflection of its offer as contained in the Union's letter of January 6, 1998. The Employer never signed any document containing the contractual revisions, nor did the parties ever meet to formalize or sign an agreement. On January 22, 1998, the Petitioner filed the instant petition.

In order for an agreement to serve as a bar to an election, it must satisfy certain substantive and formal requirements which have been well established by Board case law. In *Appalachian Shale Products Co.*, 121 NLRB 1160 (1958), the seminal case setting forth these requirements, the Board held that to constitute a bar to an election, an agreement containing substantial terms and conditions of employment sufficient to stabilize the parties' bargaining relationship must be signed by the parties prior to the filing of the petition. See also *Seton Medical Center*, 317 NLRB 87 (1995). The agreement need not be embodied in a formal document. An informal document or series of documents, such as a written proposal and a written acceptance, which nonetheless contain substantial terms and conditions of employment, are sufficient if signed. Id. (Citing *Appalachian Shale*, supra, and *Georgia Purchasing*, 230 NLRB 1174 (1977)). I conclude, as discussed below, that the agreement between the Union and the Employer does not meet the formal requirements sufficient to establish it as a bar to the instant petition.

Although the parties orally resolved all outstanding contractual issues as of January 15, 1998, the Employer signed neither of the proposed revisions submitted to it by the Union, nor did it reduce its own proposals to a writing which was thereafter signed. The Board has made it clear that contracts not signed before the filing of a petition cannot serve as a bar. *Appalachian Shale*, supra. Moreover, in *Appalachian Shale*, the Board specifically held that such unsigned contracts would not bar a petition, even though the parties consider it properly concluded and they put into effect some or all of its provisions. *Appalachian Shale*, supra at 1162. Thus, the Union's argument, including its reliance on *Auciello Iron Works, Inc.*, 303 NLRB 562 (1991); remanded *NLRB v. Auciello Iron Works*, 980 F.2d 804 (1st Cir. 1992); supplemental opinion 317 NLRB 364 (1995), enfd. 60 F.3d 24 (1st Cir. 1995), affirmed 517 U.S. 781 (1996), that the

agreement between it and the Employer should act as a bar because it came into being before the petition was filed, is unconvincing. Although, as noted in *Auciello*, supra, the moment of apparent contract formation serves as a yardstick for determining when an employer may, in the context of an alleged unfair labor practice, raise a good-faith doubt as to a union's majority status, it is of no moment in a contract-bar context, if the collective-bargaining agreement is unsigned. Without the Employer's signature on the collective-bargaining agreement, or some document referring thereto, the agreement is insufficient to act as a bar.

St. Mary's Hospital, 317 NLRB 89 (1995), also relied on by the Union, does not support a contrary finding. In *St. Mary's*, the parties had signed a tentative agreement which incorporated by specific reference other signed and dated tentative agreements for individual issues which had been resolved between the parties during the course of negotiations. The issue presented was whether the signed tentative agreement was sufficient to constitute a bar, despite the fact that there were several discrepancies between the language contained therein and that which was actually agreed on by the parties. The Board was not presented with the question raised herein, i.e., whether an unsigned document could constitute a bar to an election.

Based on the foregoing, and the record as a whole, I conclude that the instant petition is not barred by any agreement which may have existed between the Union and the Employer at the time it was filed.